

ORIGINAL

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

UNITED TRANSPORTATION UNION )  
ILLINOIS STATE LEGISLATIVE BOARD )  
 )  
Petition for rulemaking to require safe walkways )  
for railroad employees in the state )  
 )  
 )

RECEIVED  
JAN 29 2004

Illinois Commerce Commission  
RAIL SAFETY SECTION

TO3-0015

**BRIEF OF UNITED TRANSPORTATION UNION ON EXCEPTIONS TO  
ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER, and REQUEST  
FOR ORAL ARGUMENT**

The United Transportation Union strongly objects to the Administrative Law Judge's Proposed Order herein for a number of reasons:

1. The most significant reason that a walkway rule should be adopted is exemplified by a recent death in the state. On January 14, 2004 a Norfolk Southern employee, while performing work between two tracks, was killed at the railroad's Kankakee, Illinois yard. At the location of the incident there was a hazardous walkway, which apparently contributed to the employee falling down. (See affidavit of Aaron Combs attached hereto). Additionally, the Petitioner at the hearing in this matter on October 2, 2003 submitted Exhibit 7 which showed the dangers of the large ballasts being used in the Norfolk Southern yard, and that walkway problems existed throughout the said railroad yard. The complaint was submitted to the railroad in July, 2003, and no action was taken by Norfolk Southern to correct the problem. The January 14 death occurred at the same lead which was the basis of the complaint in Exhibit 7.
2. As noted in the affidavit of Mr. Combs, his camera, film and negatives depicting the scene of the incident were confiscated by the Norfolk Southern.

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JAN 29 2004

At the time in question, Mr. Combs was performing his duties in his capacity as a union official in order to document the conditions that were previously alleged in Exhibit 7. Accompanying the exceptions herein, the Petitioner is seeking the issuance of a subpoena duces tecum for return of the said evidence.

3. The Norfolk Southern's and other railroad witnesses' testimony that the walkway proposal could cause drainage problems was not supported by any data. In fact, in each state that has adopted walkway standards similar to the proposed rule here, the railroads have not experienced drainage problems as asserted by the railroads in this proceeding. Moreover, in a situation where a drainage problem may exist, the proposed regulation allows for a waiver, if appropriate.
4. The Administrative Law Judge (hereinafter "ALJ") places significance on two railroads' argument that the remote control devices in use on their properties will mitigate against the need for safe walkways. This is without foundation. Irrespective of the use of remote control devices, the walkway hazards should not be present. Even assuming *arguendo* remote control may be in use, the testimony shows that it may cause further danger because of difficulty in walking with the device for those with large waistlines. Also, despite the railroads' representations, there will be more walking along the sides of tracks with the use of remote control devices.
5. The ALJ stated that the most experienced expert witness on ballast was Mr. Joseph Lynch, called by Norfolk Southern. He did not feel the walkway regulation was needed. It is curious that such an expert did not even know that other states had walkway regulations, and that none of the railroads have complained about meeting the requirements. Mr. Lynch testified that the proposal would create unsafe interaction with track structure. This also has not been the case in other states with similar regulations. Particularly, in states such

as Washington and Oregon, which has much more rain than Illinois, they have not experienced drainage problems, nor interaction with track structure. The walkway ballast have nothing to do with track structure, despite the testimony from the railroads' witnesses. Even the Federal Railroad Administration recognizes that walkways are not covered by its regulations covering track structure.

6. Three of the four major class I U.S. railroads operating in the state do not oppose the proposed rule. These are the railroads which have many years experience operating in states with rules similar to the proposed rule. On the other hand, the Norfolk Southern and the Canadian National have no such experience.
7. The ALJ acknowledged only a few states with walkway regulations. In fact, over half of the states have some form of walkway rules.
8. The size and type of ballasts now being used by the Norfolk Southern and the other railroads opposing the petition cause many safety problems for the workers. The ALJ states that the smaller ballast size requested in the petition will affect track structure support system. That is not the case in states which have adopted regulations similar to the one proposed in the petition. The long history in those states show that the walkway ballast have nothing whatsoever to do with the track structure. Irrespective of the size of ballasts which a railroad uses, the walkway should be reasonably level and safe from obstructions.
9. The ALJ recites one statistic to support the injury rates in Illinois when "normalized" do not create a safety problem. Regardless of any "normalization", employees in the state are being injured because of unsafe walkways. Additionally, the ALJ fails to recognize that the railroads alone make the determination as to the cause of an accident/incident. That is why

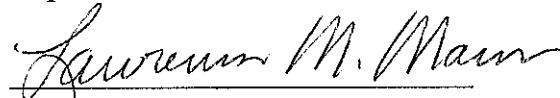
human error is consistently ranked s the highest cause of accidents/incidents. The railroads have a large economic interest in making human error the cause of an accident/incident. It will have impact on potential recoveries under the Federal Employers Liability Act. Additionally, it has been commonly known for many years that some railroads underreport accidents/incidents.

10. In its brief filed in this docket, and the testimony presented at the hearing on October 2, 2003, the UTU made various other arguments in support of the Petition which it incorporates herein by reference.
11. The ALJ's Proposed Order completely disregards the need to take preventative steps for safe walkways before another tragedy like the one which occurred at the Norfolk Southern's Kankakee Yard on January 14.
12. The Petitioner, pursuant to 83 Ill. Adm. Code § 200.850, hereby seeks oral argument regarding the recent incident in order to demonstrate the relevance to this proceeding, and to further establish the necessity for granting the petition.. Obviously, the undersigned has not had the ability to review the recent evidence, because the railroad has confiscated the camera and contents thereof.

For all of the foregoing reasons, the Administrative Law Judge's Proposed Order should not be adopted, and the Petition should be granted.

Respectfully Submitted,

Alper & Mann



Lawrence M. Mann  
1667 K. Street, N.W.  
11<sup>th</sup> Floor  
Washington, D.C. 20006  
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 28<sup>th</sup> day of January, 2004, that I mailed postage prepaid to all parties of record a copy of the United Transportation Union's Brief on Exceptions To The Administrative Law Judge's Proposed Order.

Lawrence M. Mann

Lawrence M. Mann

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**AFFIDAVIT OF AARON COMBS**

Aaron Combs, being first duly sworn under oath, deposes and says:

1. I am a Local Chairman/Alternate Legislative Representative, United Transportation Union Local 1003, State of Illinois.
2. Regarding an incident on January 14<sup>th</sup> 2003, in which Stephen Hall was killed by railroad equipment at Norfolk Southern Kankakee West Yard, Illinois, I was contacted by a member at approximately 12 Noon CST that an incident had occurred at the said yard. I was told that Steve Hall had been seriously injured, and I left the house immediately with intentions of meeting him at the hospital. Instead, I was told to come to the yard and that it "didn't look good." I arrived at the south entrance to the yard and identified myself as a union representative to a police officer that was at the entrance and was allowed to go to the scene of the incident. I drove down the entrance road and another unmarked police vehicle was there. As I approached the scene, I noticed a body partially covered by a cloth of some type. I got out of my truck and introduced myself to the officers in the car. They said they were Kankakee city police officers, and I explained that I was there to investigate the incident and walked away towards the accident scene.
3. The main road that enters the yard runs along a gravel right of way of a yard track referred to as track 22. Parallel to this is what is called the switching lead in which cars are "flat switched". Flat switching is the practice of placing cars in their corresponding track either car by car or by what is known as "kicking". "Kicking" is the practice of a locomotive and a number of cars being connected together. The conductor or brakeman positions themselves furthest from the locomotive. The locomotive then begins to shove the cars and a crewmember detaches the proper cars then

in motion by pulling a lever attached to each individual car referred to a "cutting lever". The car or cars then roll under their own power into the corresponding tracks. A track switch is then thrown in correspondence to the classification of the next car or cars and the process is repeated.

4. This switching lead has tracks that are numbered from 5 to 21. . The track layout at this yard is in the West to East direction with track number 5 being the furthest West. The scene appeared to look like the above stated practice of flat switching and/or kicking to had occurred. Locomotive NS 5502 was attached to approximately 15 cars and the end of the cars were near the scene where Mr. Hall's body was located. I crossed over track 22 and took some photos of the scene.

5. The locomotive was on the West end of the cars and the conductor would be toward the east end of the cars. Cars at this location are switched to enter the tracks from the West end of those said tracks. From the correspondence of the track switches and comments from Yardmaster Bruce Messer, Mr. Hall appeared to have been kicking a car into track 16. Mr. Hall would have been moving in a west to east direction in order to follow along side the cars while they were being "kicked". I found Mr. Hall's body to be located just a few feet east of a place where a track switch had been removed. This track would have been numbered track 15, as it was between two active tracks still in service, tracks 14 and 16. A track switch requires the ties that lay beneath the track structure be extended several additional feet in order for the actual switch mechanism to have a firm attachment to the said track structure. When track 15 was completely removed from this yard many years ago, these extended length ties were not removed and instead the railroad had ballast dumped over them in an effort to conceal them. At the scene of the incident, the ties were partially covered with a mound of ballast.

6. In my observation of the surrounding area of Mr. Halls body I witnessed several (3 or 4) marks in the ballast that looked to possibly be a place where Mr. Hall stumbled. These marks in the ballast were on the west slope of the mound of ballast previously described approaching the place where the previous track 15 switch was located. These marks in the ballast were what I would consider significant evidence of where Mr. Hall would have fallen. The ballast at this location is quite old and there is a lot of dirt underneath the said ballast at this location. While the top ballast is a light gray, the top 1 or 2 inches of ballast underneath reveals a darker dirt-like

appearance. The reason I believe Mr. Hall was tripped by this mound of ballast is that, at this location, the marks were very fresh.

7. In the type of switching referred to above, it is not uncommon to have speeds while kicking cars over 5 to 10 miles per hour. While I do not know the exact speed of the particular move involving Mr. Hall, in my past practice working at this location, it would have been at or above 5 miles per hour. This speed would have been consistent with the type of cars being kicked on this particular move and the location to which the cars were being switched. I believe the car or cars being switched into track 16 on this move would have been empty. Currently, and in the past, this particular track stored empty grain cars. These types of cars, while being empty, would have required the above stated speed to have sufficient momentum to negotiate the track structure and curves in order to drift the required distance into track 16 and couple onto the cars being stored in this track.

8. It appeared that Mr. Hall was pacing along side these cars in order to cut off the required car or cars. In my observation, this mound of ballast overwhelmed Mr. Hall as he was probably moving at a brisk pace during this move and he could not adjust his posture fast enough. Since 1997 I have worked in this yard switching many times. While being assigned to the road for much of the time, my preference was working an assigned job that worked this yard either as a brakeman or conductor. I have spent many days switching at this location, and have found that while pacing along side a car in order to cut it off while kicking, the resulting body action that occurs when negotiating a sudden change in grade could have resulted in Mr. Hall falling. The resulting rise in grade would either require the legs to bend at the knee, require a person to drop their shoulder on the side holding the cutting lever or would require a hunching over to the front in order to maintain their hold or any combination of the above. The resulting body adjustments would have required additional coordination while still maintaining pace, balance and a firm hold on the cutting lever, while simultaneously operating a two-way radio to direct the engineer to stop. While I do not know exactly the chain of events, this is my observation made from experience at this location and the evidence at the location of this accident. I should note that this location was reported within the past year as a hazardous walking environment and has been reported to the Norfolk Southern many times previous.

9. My camera and the said photos that I took of the scene of the accident were confiscated by the Norfolk Southern.



I , Aaron Combs, being first duly sworn, say that I have read the above affidavit and know what it says. The contents are true to the best of my knowledge.

Aaron Combs

Aaron Combs

Subscribed and sworn to before me this 27 day of January 2004.

Margaret A. Clifton

Notary Public, Illinois

